

March 31, 1998

Craig P. Smith, Deputy Administrator
Construction Contractors Board
700 Summer Street NE, Suite 300
P.O. Box 14140
Salem, OR 97309-5052

Re: Opinion Request OP-1998-1

Dear Mr. Smith:

You ask whether the activity of locating, unearthing the opening, draining and pumping residential septic tanks can create a construction lien for the labor used in performing the work. We conclude that this activity cannot be the basis for a construction lien because servicing septic tanks does not involve the construction of an improvement or the preparation of land for construction.

Discussion

Construction liens are authorized by ORS 87.010, which provides in relevant part:

(1) Any person performing labor upon, transporting or furnishing any material to be used in * * * *the construction of any improvement* shall have a lien upon the improvement for the labor, transportation or material furnished * * * at the instance of the owner of the improvement * * *.

(2) Any person who engages in * * * *the preparation of a lot or parcel of land*, * * * at the request of the owner of the lot or parcel, shall have a lien upon the land for work done * * *.

(Emphasis added.) Below, we analyze whether the activity of servicing septic tanks may be categorized as either "the construction of any improvement" or "the preparation of a lot or parcel of land."

1. Construction of an Improvement

In Oregon, a person who performs "construction of any improvement" to an owner's property may use a construction lien to recover costs. ORS 87.010(1). "Construction" is defined as including:

creation or making of an improvement, and alteration, partial construction and repairs done in and upon an improvement.

ORS 87.005(2). "Improvement" is defined as:

any building, wharf, bridge, ditch, flume, reservoir, well, tunnel, fence, street, sidewalk, machinery, aqueduct and all other structures and superstructures, whenever it can be made applicable thereto.

ORS 87.005(5).

Thus, "construction" refers to the process, i.e., the act of building, altering or repairing; whereas, "improvement" refers to the product the work creates or changes, i.e. the structure. *Miller v. Ogden*, 134 Or App 589, 597, 896 P2d 596 (1995), *aff'd* 325 Or 248 (1997).

An improvement includes not only the listed structures, e.g., building, wharf, but "all other structures." ORS 87.005(2). The courts have broadly interpreted "other structures" to encompass other projects with characteristics similar to those listed in the statute, such as a driveway and retaining wall, *McCormack v. Bertschinger*, 115 Or 250, 237 P 363 (1925), and a log dump, *Abajian v. Hill*, 42 Or App 695, 601 P2d 837 (1979). In *Abajian*, the court commented on the characteristics of improvements and other structures, stating:

the pertinent * * * characteristics of * * * improvements are that they are additions to the land of a relatively permanent nature which increase the value or utility of the land. Thus, the statutory phrase "other structures" is more flexible than Cinderella's slipper; it covers improvements with those characteristics.

Id. at 700.

A residential septic tank is an "other structure" within the meaning of "improvement." The question is whether the activity of *servicing* (locating, unearthing the opening, draining and pumping) a residential septic tank constitutes the "construction of an improvement" under ORS 87.010(1). We conclude that it does not.

Servicing a septic tank involves cleaning out an existing structure; it does not create or build a new structure. Nor does servicing involve alteration, reconstruction or repair of an existing structure. "Repair" means "to restore by replacing a part or putting together what is torn or broken." Webster's Third New International Dictionary 1923 (unabridged 1993). Repairing something is the same as fixing or mending that thing.⁽¹⁾ The work at issue here does not involve fixing or mending a septic tank, but simply cleaning out what is in the tank. If the person servicing the septic tank were also to repair that tank, however, then the work could be construction of an improvement and subject to lien.

2. Preparation of Land

Under ORS 87.010(2), a lien is also created when a person is engaged in work for "the preparation of a lot or parcel of land." Preparation includes:

excavating, surveying, landscaping, demolition and detachment of existing structures, leveling, filling in, and other preparation of land for construction.

ORS 87.005(9). Allowing "preparation" projects to be lienable assures contractors (and subcontractors) that their right to recover costs for work done on component undertakings in the construction will be protected the same as if the work were done on the finished building. See *Robison v. Thatcher*, 252 Or 603, 605, 451 P2d 863 (1969).

To determine whether a project involves "preparation," courts analyze how or in what way the project contributes to the larger project of construction. See *Abajian*, at 698. If the project contributes to preparation of land for construction, the project is lienable. *Id.* at 699. Because servicing septic tanks is not preparing land for construction, septic tank servicing does not come within ORS 87.010(2).

Sincerely,

Donald C. Arnold
Chief Counsel
General Counsel Division

1. "Repairs" is also defined as:

the portion of maintenance charges expended to keep fixed assets in adequate and efficient operating condition and recorded on the books as expense - contrasted with *renewal* and *replacement*.

Webster's Third New International Dictionary 1923 (unabridged 1993). This definition relates to "charges" and "expenses" and is not directly relevant to the type of "repairs" referenced in ORS 87.005(2).

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